981.

SUPREME COURT OF THE UNITED STATES.

No. 138.

GEORGE SMITH, APPELLANT,

vs.

JOHN J. ORTON.

APPEAL FROM THE DISTRICT COURT U. STATES FOR THE DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Bill of complaint	2	1
Schedule A, annexed to bill	18	9
Schedule B, annexed to bill	21	11
Subpœna	24	12
Return to subpœna	25	13
Appearance of defendant	25	13
Demurrer	26	14
Order to plead	28	15
Time for hearing demurrer extended	28	15
Demurrer set down for argument	29	15
Amendment to demurrer	29	15
Decree	30	16
Appeal	30	16
Appeal bond	31	16
Clerk's certificate	33	17
Citation and service	34	17

GIDEON, PRINT.

UNITED STATES OF AMERICA,
District of Wisconsin, ss.

District Court of the United States of America for the District of Wisconsin.

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee on the first Monday of January, in the year of our Lord one thousand eight hundred and fifty-seven. Present, the honorable Andrew G. Miller, judge of said court, presiding; Stephen V. R. Ableman, marshal; John L. Hathaway, clerk.

Among other were the following proceedings, to wit:

GEORGE SMITH
vs.
JOHN J. ORTON.

Be it remembered, that heretofore, to wit, on the fifth day of July, in the year of our Lord one thousand eight hundred and fifty-six, the said George Smith, by Messrs. Brown and Ogden, his solicitors, filed his bill of complaint against John J. Orton, in the words and of tenor following, to wit:

Bill.

UNITED STATES OF AMERICA.

District Court of the United States for the district of Wisconsin.—In Chancery.

To the Judge of the District Court of the United States for the district of Wisconsin.

George Smith, of the city of Chicago, in the State of Illinois, and a citizen of the State of Illinois, brings this his bill against John J. Orton, of the county of Milwaukee, in the State of Wisconsin, and a citizen of the State of Wisconsin.

And thereupon your orator complains and says, that heretofore, to wit, on or about the 14th day of July, A. D. 1848, one Cyrus D. Davis was lawfully seized of the legal estate in fee simple of the following premises, to wit: lots number seven and eight in section number nine, in township number seven north, of range number twenty-two east, except three acres before that time conveyed to one Peter Boerg, by the said Davis, in said district; that the said Davis was so seized of said premises in trust for one Otis Hubbard (now deceased) and for his use and benefit, and neither had, nor claimed to have, any interest therein for himself; that the said Hubbard likewise claimed the beneficial interest in lots number five and six, in block number forty-

three, in the second ward of the city of Milwaukee, and, upon the advice and solicitation of one Turtullus D. Butler, who was a connexion of the said Hubbard, made an arrangement with one Joseph Schram to sell to him, said Schram, a part of said lots last mentioned.

And your orator further shows that, as he is informed and believes, the said Hubbard, although at that time capable in the law of transacting business, was nevertheless injured in his mind and in his business capacity by age and habitual intemperance, and could be very easily imposed upon and cheated by one in whom he had confidence; that he had great confidence in the said Butler as a friend and family connexion, and desired to sell said lots in consequence of the advice of the said Butler as aforesaid, and trusted the entire management of the sale to the said Butler; that, as your orator is informed and believes, the said Schram agreed to pay one thousand dollars for said part of said lots in said block, but would not pay said money without either actually receiving a good and sufficient conveyance of said lots or security therefor; that the legal title to said lots was in certain relations of the said Hubbard, residing out of the State of Wisconsin, and partly in the State of Massachusetts and partly in New York, and deeds from them could not be procured without some delay; that the said Butler, being anxious to receive a portion of the purchase money to use in his own business, proposed to give security to the said Schram that a good title should be vested in him; that, with this view, he induced the said Hubbard to speak with one David Knab and ask him to give security for him, the said Hubbard, in the premises; that the said Hubbard did speak with the said Knab on the subject and proposed to secure the said Knab upon said premises first above mentioned, the legal title to which was in the said Davis as aforesaid; that the said Butler afterwards spoke to the said Knab on the same subject, and the said Knab agreed to sign a bond with the said Butler, upon receiving security as aforesaid. That afterwards, to wit, on the twenty-first day of July, A. D. 1848, the said Hubbard applied to the said Davis for a deed of said premises, first hereinbefore mentioned, running to the said Knab, and the said Davis, at the request of said Hubbard, and for the reason that the said Hubbard was the sole owner of said premises as aforesaid, and for no other consideration, executed and acknowledged a quit-claim deed bearing date the day and year last aforesaid, conveying said premises to the said Knab in fee simple, and delivered the same to the said Hubbard.

And your orator further shows, that on the next day, to wit, on the twenty-second day of July, the said Hubbard, at the request of said Butler, went to the office of Hemenway, Ripley and Wells, and there, with said Butler, executed a bond by which they bound themselves to procure, within three months from that date, a good title to said part of said lots in said block to themselves, and to convey the same to the said Schram by deed with covenants of warranty, (he the said Schram executing a mortgage thereon for the sum of three hundred and fifty dollars), as by reference to a copy of said bond hereunto

annexed, and marked (A) and made part of this bill, will more fully and at large appear. And your orator further shows, that the said deed, from the said Davis, was then and there delivered to the said Knab for security as aforesaid, and the said Knab then and there executed an instrument in writing bearing date on the said 22d day of July, (a copy of which said instrument is hereunto annexed, marked (B) and made part of this bill), by which he bound himself unto the said Butler, in the penal sum of two thousand dollars; that upon the performance by the said Butler, at his own cost and charges, of all and singular the agreements of the said Butler and Knab in the said bond to the said Scram mentioned, (except as to the said deed from Butler and Knab), he, the said Knab, would convey the said premises so conveyed to him by the deed of the said Davis as aforesaid to the said Butler, it being recited in said instrument that the said Knab was surety for the said Butler, obligee as aforesaid.

And your orator further shows, that the said Knab, as your orator is informed and believes, signed said instrument without knowing the contents thereof, and without knowing that it so run to the said Butler as aforesaid, without having the nature thereof explained to him, and without any previous agreement or understanding to that effect, but at the request of the said Butler and under the supposition that the papers were all properly drawn, and never acknowledged said instrument except by the mere signing as aforesaid, in the presence of a notary public, who was then present; that the said Butler never paid the said Knab anything for signing it, and that the said Knab never paid anything to the said Davis for his said deed, and never claimed any other right to said premises, described in said deed, than as security as aforesaid.

And your orator further shows, that, under the statutes of the Territory of Wisconsin, at that time in force in the State of Wisconsin, the said deed and instrument in writing, together, show that the title of the said Knab was in the nature of a mortgage, and constituted a mortgage to secure him against said bond given to the said Scram as aforesaid; and that the equity of redemption was in the said Davis, by virtue of his previous legal title, and in the said Hubbard, by virtue of his equitable title as aforesaid, and that the said Butler, independently of the fraud, did not nor could acquire any right to said premises.

And your orator further shows, that the said Knab left the said bond and other instrument in writing lying on the table in the said office, and on the same day caused the said conveyance to him to be recorded as a deed in the office of the register of deeds of said county; that the said Hubbard was not present at the time said bond and other instrument in writing were signed, and that said Knab never delivered them or knew what became of them until a period long subsequent.

Your orator further shows, that he is informed and believes the said Schram then and there paid to the said Butler five hundred dollars, part of the consideration money for the purchase of said premises in said block 43, and that said Butler never caused said instruments in writing,

signed by the said Knab, to be recorded; and that the said Hubbard remained in ignorance of it until a period long subsequent, having been induced to believe that said Knab, who was known to him (said Hubbard) as a man of honor and integrity, in whose word, for the reconveyance of said lot, implicit credit and reliance could be placed, had not given any instrument for the reconveyance of the same.

And your orator further shows, that he is informed and believes, and so charges, that said Butler never fulfilled the condition of said bond signed by him and the said Knab, and never performed the agreements therein contained, but that the said Hubbard long (to wit, more than a year) after the time limited therefor in said bond procured deeds to himself from his said trustees, and did thereafter convey said premises in said block 43 to the said Schram; that neither the said Butler nor the said Knab ever acquired, or had any title or interest in the premises, or conveyed any to the said Schram; that the said premises were for a long period after the same were conveyed to the said Hubbard by his said trustees subject to the lien of a judgment against the said Hubbard; and the said Schram held the said bond of the said Butler for more than two years with its conditions unperformed and the penalty thereof forfeited according to its terms, and with a full right of action thereon against the said Knab and Butler; that after the assignment of the said Butler to the said Orton hereinafter mentioned, the said Orton in some way agreed to indemnify the said Scram against incumbrances on his title, and procure either a surrender or assignment of said bond so given by the said Butler and Knab to the said Scram.

And your orator further shows, that on or about the fourteenth day of March, A. D. 1851, the said Butler executed an assignment to the said Orton of said instrument in writing, signed by said Knab, and running to said Butler as aforesaid, and acknowledge the same; that the said Orton immediately caused the said bond to be recorded, together with said assignment, in volume thirty-two of Deeds, on pages four hundred and sixty-six and four hundred and sixty-seven, in the office of the register of deeds of Milwaukee county aforesaid.

And your orator further shows, that he is informed, and believes, that said Butler in all his said transactions in relation to the sale of said lots to said Schram, and to the conveying of said premises to the said Knab by way of security, and to the said instrument in writing, and the said assignment, acted fraudulently, violating the trust reposed by the said Hubbard in him as a friend, a connection, and an agent, and taking advantage of the mental weakness of the said Hubbard for the purpose of defrauding him, and of obtaining the property of the said Hubbard to himself, the said Butler; your orator therefore charges, that as against said Hubbard, and the said Knab, the said instrument so assigned by the said Butler to said Orton was, and is, a nullity.

And your orator further shows, that the said Hubbard, on the seventh day of June, A. D. 1851, still having the entire beneficial interest in said lots 7 and 8 in said section, did, for a good and valuable consideration, on the day and year last aforesaid, duly execute, acknow-

ledge, and deliver, a deed conveying said premises in fee simple to one Joachim ——— Gruenhagin, by which said Gruenhagin became seized in fee simple of the entire estate of the said Hubbard in said premises both in law and equity; that the said Gruenhagin did afterwards, to wit, on the 31st day of December, A. D. 1852, by a good and valid conveyance, convey the same to one James S. Brown in fee simple, and the said Brown did afterwards, for a valuable consideration, by a good and sufficient deed, dated on or about the first day of January, A. D. 1853, convey the same in fee simple to your orator; that afterwards, on or about the first day of February, A. D. 1853, the said Cyrus D. Davis, at the request of Increase A. Lapham, administrator of the estate of said Hubbard, then deceased, and because your orator was grantee, as aforesaid, of the said Hubbard, and because the said Davis acknowledged and recognised the right of the said Hubbard to dispose of all the title and interest in said property standing in the name of him, said Davis, executed and delivered to your orator a good and sufficient deed conveying to your orator the entire estate of the said Davis in said premises.

And your orator further shows, that he is informed, and believes, that the said Hubbard in his lifetime, in ignorance of the existence of the said instrument in writing in the hands of said Butler, and considering said Knab as simply surety for himself, and desirous both of releasing his said surety and of obtaining title to said premises so conveyed to the said Knab as aforesaid, and without any new consideration, conveyed said part of said lots in said block 43 to the said Schram, and that all judgments not paid off by said Hubbard in his lifetime were subsequently paid off by his administrator, and partly out of the funds received by said administrator from the grantors of your orator on account of said premises; that the said Hubbard, after he had learned, by the recording of said instrument running to said Butler as aforesaid, that the same had been given and assigned to the said Orton, and after he had so conveyed said premises to the said Gruenhagin as aforesaid, for the purpose of avoiding any defence which might be made by the said Gruenhagin to the payment of a part of the consideration money for said purchase, and by arrangement with him, filed a bill in the circuit court of the county of Milwaukee, on the chancery side, against said Butler, Orton, and Knab, praying, among other things, an injunction against any conveyance of the said premises to said Orton, and for a conveyance from the said Knab to himself; upon which said bill a preliminary injunction as aforesaid was allowed by the said court; that the said Orton, within a few days after the commencement of said suit against him, filed his original bill in said court, on the chancery side, against said Knab, alone claiming and setting forth, among other things, that said Knab, upon the day of the date of said instrument so signed by him as aforesaid, was seized of a good and perfect title, in fee simple, in said premises; and the said Butler, as purchaser, entered into said contract with him, said Knab; and that said Butler and Orton had fulfilled the condition and performed the consideration

mentioned in said instrument; upon which said Knab therein agreed to convey the same, and mentioning no other consideration as paid for said premises by said Butler, and claiming for him no other character than as purchaser from said Knab by virtue of said instrument; that the said Knab filed an answer not denying or putting in issue directly said obligation that the said Butler and Orton had fulfilled the condition mentioned in said instrument upon which said premises should be conveyed as aforesaid, but setting up, among other things, that he held the premises merely by way of security, and as the property of the said Hubbard; that he had received notice from said Hubbard that the property was his, (said Hubbard's,) and not to convey to said Orton; and that he, said Knab, did not care to whom he conveyed, and submitted the matter to the court, praying, however, that said Hubbard might be made a party.

And your orator further shows, that said suit commenced by said Hubbard as aforesaid, was, after his death, discontinued for the reason that the complainant had parted with his interest as aforesaid before the commencement of said suit, and therefore no testimony was ever taken in it; that your orator induced said Knab to take testimony in said suit of Orton vs. him, (Knab,) for the purpose of forcing said Orton to make your orator a party to said suit, so that a proper defence and proper pleadings might be put into said suit; but the said Orton did not nor would make your orator or any assignee or representative of the said Hubbard a party, but persisted in forcing the same on to a hearing upon the pleadings as they stood, and without any party in interest being a party to the defence.

And your orator further shows, that while said suit of the said Orton was so pending as aforesaid, the right of your orator, as purchaser under the said Hubbard, to demand a deed and release from the said Knab of said premises, (the interest of said Knab therein by way of security having been satisfied by said Hubbard, and those representing him as aforesaid,) became perfect, and could not be defeated or affected by the ex parte act of said Orton in filing said bill against said Knab, and making him alone a party; that the said Knab was under no injunction in that cause against conveying said premises, and by a refusal would have rendered himself liable to a suit from your orator to enforce a deed; that the said Knab for these reasons, and because he fully recognised the understanding and agreement that the property was the property of the said Hubbard, subject only to his, said Knab's, right by the way of security, on or about the first day of February, A. D. 1853, executed and *deliver* to your orator a deed conveying said premises to him in fee simple, whereby the mortgage and legal interest of the said Knab was extinguished and released.

And your orator further shows, that subsequently, in the fall of the year 1853, said suit of the said Orton against said Knab came on to a hearing, and was by said court dismissed without prejudice, for the reason that neither said Hubbard, nor those claiming under him, had been made parties to said suit, as by said proceeding and the record

thereof now remaining in said court, or a copy thereof, now here ready to be produced as this court shall direct, will more fully and at large appear, and that by virtue of the premises upon the dismissal of said cause, your orator became and was then and there the absolute owner in fee simple of said premises, with full right to sell and convey the same, and that his title could not be defeated or affected by any proceeding between third persons, to which he was not a party.

And your orator further shows, that, as he is informed and believes, in about sixty days after said cause was so dismissed as aforesaid, the said Orton commenced his proceedings in the supreme court of the State of Wisconsin, by the way of appeal from said order of dismissal, so made and entered by the circuit court as aforesaid, in which said appeal the said Orton was appellant as aforesaid, and the said David Knab was sole appellee and party defendant; and that afterwards, on or about the month of September, A. D. 1854, the said supreme court entered a decree reversing the said order of the circuit court aforesaid, and directing the said Knab to execute a deed of said premises, or, in default thereof, that one H. L. Palmer should, as commissioner of the court, execute such deed for him (the said Knab); and assigning as a reason for said reversal and decree (among other things) that the said Knab had no interest in the defence of fraud, and having acknowleged, by his answer, that his interest by way of security in said premises had been satisfied, it did not concern him whether *whether* the complainant and Butler had practised a fraud upon Hubbard or not.

And your orator further shows, that the said H. L. Palmer did, upon the refusal of the said Knab, execute a deed, under said decree, purporting to convey to said Orton said premises in fee simple, as by the records of said supreme court (a copy of which is now here ready to be produced) will more fully and at large appear.

And your orator further shows, that said premises are, and for the last two years have been, unoccupied and unenclosed, and that the possession thereof is, in the law, with the party having the legal title thereto; and that they are of great value, to wit, of the value of ten thousand dollars or more.

And your orator further shows, that he claims that said proceedings of the said Orton against said Knab alone were and are a fraud upon the rights of your orator and those under whom he claims title as aforesaid; and that, if any portion of the legal title of said premises passed to said Orton, by virtue of said decree of said supreme court and of said deed, from said Palmer, it passed in trust for the use and benefit of your orator, and subject to all the rights existing in said Hubbard and Davis, and your orator as purchaser as aforesaid from said Hubbard and Davis, against either said Knab or said Butler; that said Orton did not nor could, by virtue of said proceedings, acquire any other or greater rights in equity than said Butler himself had, or than said Knab; that said Butler, receiving a deed from said Knab, would have been merely trustee for those under whom your orator claims, and the said Orton is in the same or no better position.

And your orator further shows, that the said Orton was, when he so took an assignment of said bond as aforesaid, an attorney by profession, and, as your orator is informed and believes, examined the records in the office of the register of deeds of Milwaukee county, and must have there discovered that the said Butler had performed none of the conditions upon which, under said instrument so assigned as aforesaid, all right to a deed depends; but that, on the contrary, all consideration, mentioned or referred to in said instrument for said deed, had moved from the said Hubbard.

And your orator further shows, that the said Orton now gives out and claims that he is the legal and equitable owner of said premises, in said section nine, by virtue of said assignment and said decree, and that your orator has no right or interest in the same, either in law or equity, and utterly refuses to recognise or allow any interest in your orator therein; whereby your orator has been greatly injured, and a cloud has been cast over his title to said premises, and he otherwise greatly injured in the use and enjoyment thereof, and is prevented from making sale of them.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may, upon his corporal oath, full, true, direct and perfect answer make to such of the interrogatories hereinafter numbered and set forth as, by the note hereunder written, he is required to answer, that is to say:

First. Whether the said Butler assigned the said instrument in writing, signed by the said Knab, and running to the said Butler as aforesaid, to the said Orton?

Second. Whether said Butler caused said instrument in writing and assignment to be recorded as set out in this bill?

Third. Whether the said Orton has set up a claim of title or beneficial interest in said premises in himself?

Fourth. Whether the said Orton, at the time he took said assignment, was an attorney by profession?

And that, on the final hearing of this cause, the said instrument, so assigned as aforesaid, be declared fraudulent and void as against your orator, and the said Orton be decreed to release all claim or interest in said lots in said section No. nine, and be forever barred and enjoined by the order and decree of this court from setting up or asserting any claim or right to the said premises, and be decreed to pay all the costs of your orator in this behalf most wrongfully sustained; and that your orator may have such other or further relief in the premises as may be agreeable to equity and good conscience; and that, until the final hearing of this cause, the said Orton may be restrained by the injunction of this honorable court from assigning or disposing of or conveying said premises, or any part thereof:

May it please your honor, the premises considered, to grant unto your orator the most gracious writ of subpœna, issuing out of and under the seal of this court, directed to the said John J. Orton therein, and thereby commanding him, at a certain time and under a certain penalty therein

to be specified, to be and appear before this honorable court, and then and there to stand to, perform and abide by such order, direction and decree in the premises as to your honor may seem meet; and your orator will ever pray, &c.

GEORGE SMITH,
By his Att'y,
ALEX. MITCHELL.

BROWN & OGDEN,
Solr's for Compl't.
THOMAS L. OGDEN,
Of Counsel.

DISTRICT OF WISCONSIN, *ss.*

On this 26th day of Jan., A. D. 1856, before me personally came Alexander Mitchell, who, being duly sworn, deposeth and saith, that George Smith, the complainant in the foregoing bill of complaint, is not a resident of the State of Wisconsin, nor now in said State; that the affiant is the duly authorized agent of the said George Smith; that this affiant has read the foregoing bill of complaint, and knows the contents thereof, and has information as to all the matters stated therein; upon such information he believes said matters to be truly stated, and the bill to be true.

D. A. J. UPHAM,
Com. U. S. Dis. Court, Dis. of Wisconsin.

Note.—The defendant, John J. Orton, is required to answer interrogatories numbered 1, 2, and 3, and 4.

BROWN & OGDEN, *Sol'rs, &c.*

Schedule A.

A.

Tertullus D. Butler and David Knabb to Joseph Schram.—Bond recorded vol. 24 of Deeds, on pages 424 and '5.

Know all men by these presents, that we, Tertullus D. Butler and David Knabb, of the city of Milwaukee and State of Wisconsin, holden and stand firmly bound unto Joseph Schram, of the same place, in the full and just sum of two thousand dollars, lawful money, to be paid unto the said Joseph Schram, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, each and every of them, firmly by these presents. Witness our hands and seals, dated the twenty-second day of July, in the year of our Lord one thousand eight hundred and forty-eight.

Whereas the said Butler and Knabb, for and in consideration of the sum of nine hundred dollars, have agreed to convey to said Schram the following real estate, situated in the Second ward of said city of

Milwaukee, viz: a part of lots five (5) and six (6), in block forty-three (43), commencing on Chestnut street twenty-five feet east of the northwest corner of said lot five (5); thence south one hundred and twenty feet (120); thence west, parallel with the north line of said lots, twenty-five feet (25) to the west line of said lot five (5); thence north on said west line sixty (60) feet; thence west, parallel with the north line of said lot six, (6) ten (10) feet; thence north, parallel with the east line of said lot six (6) sixty feet to the north line of said lot six (6); thence east thirty-five (35) feet, along the north line of said lots five and six (5 and 6), to the place of beginning; being twenty-five feet front on Chestnut street, by one hundred and twenty-five feet deep of said lot five (5), and ten feet front on Chestnut street, by sixty feet deep of said lot six (6). And whereas the title to said premises above described is now in Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and the said Butler and Knabb have agreed to procure from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, a deed of the said premises to themselves, the said Butler and Knabb, and to do such further acts as may be necessary to make the title to said premises free and clear of all and every incumbrance or incumbrances in themselves, the said Butler and Knabb: And whereas the said Butler and Knabb have, for the consideration above mentioned, agreed to convey to said Schram, his heirs and assigns forever, the above premises, by a good and sufficient deed in the law in fee simple, with full covenants of warranty against all and every incumbrance or incumbrances, of what name and kind soever, except a lease of said premises for the term of one year, from the first day of May, A. D. 1848; said deed to be executed within three months from the date hereof, and to be delivered to said Schram, upon the execution by said Schram and delivery to said Butler and Knabb of a mortgage upon said premises, for the sum of three hundred and fifty dollars, payable in eighteen months from the date hereof, with seven per cent. per annum interest: And whereas said Butler and Knabb have further agreed that said Schram shall have immediate possession of said premises, subject to said lease above mentioned: Now, the condition of this obligation is such, that if the said Butler and Knabb shall procure a deed as above mentioned from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, within three months from the date hereof, and shall convey the said premises to said Schram as above agreed, and shall well and truly perform all their agreements in this instrument contained, then this obligation to be void, otherwise to remain in full force and virtue.

T. D. BUTLER. [SEAL.]
DAVID KNABB. [SEAL.]

Signed, sealed, and delivered in presence of—
FRANKLIN RIPLEY,
CHARLES K. WELLS.

STATE OF WISCONSIN,
Milwaukee County, ss.

On this 22d day of July, A. D. 1848, personally came before me Tertullus D. Baker and Daniel Knabb, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed for the uses and purposes therein mentioned.

Recorded July 22d, A. D. 1848, at 2½ o'clock, p. m.

FRANKLIN RIPLEY,
Notary Public.

Schedule B.

B.

David Knabb to Tertullus D. Butler.

Know all men by these presents, that I, David Knab, of the city and county of Milwaukee, Wisconsin, am held and firmly bound unto Tertullus D. Butler, of the same place, in the sum of two thousand dollars, lawful money; for the payment of which sum, well and truly to be made to said Butler, his heirs, executors, administrators and assigns, I bind myself, my heirs, executors and assigns, each and every of them, firmly by these presents. Sealed with my seal, dated this twenty-second day of July, A. D. 1848.

Whereas the said Knabb has jointly with said Butler executed to one Joseph Schram a bond, with even date herewith, wherein said Butler and Knab bind themselves, their heirs, &c., to execute to said Schram a deed of a part of lots five and six (5 and 6), in block forty-three (43), in the Second ward of said city of Milwaukee, for a more particular description of which premises reference may be had to said bond; and whereas said Butler and Knab in said bond further agreed to procure a deed of said premises in said bond described from Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, to themselves, the said Butler and Knabb, before said Butler and Knab should execute the deed as above mentioned to said Schram; and whereas said Butler and Knab in said bond made certain other agreements to and with said Schram, for which agreements, and for a full explanation of all the agreements of said Butler and Knab with said Schram, reference is hereby made to said bond; and whereas the said Knab executed said bond with said Butler to said Schram, as security for said Butler, for the performance of the covenants and agreements on the part of said Butler and Knab in said bond contained; and whereas said Butler has agreed to procure the deed from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, to said Butler and Knab, as in said bond mentioned, at the proper cost and expense of himself, the said Butler; and whereas the said Butler has agreed to save the said Knab harmless from all damage, costs, charges, or expenses, from or on account of said bond; and whereas said Butler has agreed to perform, at his own

cost, all the agreements which said Butler and Knab in said bond have obligated themselves to perform; and whereas said Knab, in consideration that the said Butler shall, at his own costs and expenses, procure the deed above mentioned from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and shall, at his, the said Butler's, own costs and expenses, perform all the agreements which said Butler and Knab in said bond have obligated themselves to perform, except wherein said Butler and Knab agree to execute to said Schram a deed of said premises, which said Butler and Knab are both to execute, has agreed to convey to said Butler the following described real estate, viz: lots seven (7) and eight (8), of section nine (9), in township No. seven (7) north, of range No. twenty-two (22) east, in the district of lands subject to sale at Milwaukee, Wisconsin, except three acres of said tract of land heretofore sold by Cyrus D. Davis:

Now, therefore, the condition of this obligation is such, that if on the performance on the part of said Butler of his agreements as in this bond mentioned, said Knab shall execute to said Butler, his heirs and assigns, a deed of said last described premises free and clear of all incumbrances suffered by, through, or under him, the said Knab, then this obligation to be void, otherwise to be in full force, power, and virtue.

DAVID KNAB. [SEAL.]

In presence of—
F. RIPLEY,
CHAS. K. WELLS.

STATE OF WISCONSIN,
Milwaukee County, ss.

On this 22d day of July, A. D. 1848, before me personally appeared David Knab, to me known to be the person who executed the foregoing bond, and acknowledged the same to be his free act and deed.

FRANKLIN RIPLEY,
Notary Public.

Whereupon a subpœna issued, as follows:

Subpœna.

UNITED STATES OF AMERICA,
District of Wisconsin, ss.

[SEAL.] The President of the United States of America to John J. Orton, greeting:

You are hereby commanded, that you personally appear before the judge of the district court of the United States of America for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of August next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by George Smith; and to do further, and receive what our said court

shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said John J. Orton, if to be found in his district, and due return thereof make.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this fifth day of July, in the year of our Lord one thousand eight hundred and fifty-six, and of our independence the eighty-first.

B. K. MILLER, *Clerk*.

BROWN & OGDEN, *Solicitors*.

It is ordered by our said court, that the said John J. Orton, the defendant aforesaid, do enter his appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable as aforesaid, otherwise the bill filed may be taken as confessed.

Return.

The said subpœna was returned with the following endorsement thereon, to wit:

This writ served personally on the within named John J. Orton, by showing him the original and giving him a copy thereof, July 8th, 1856.

S. V. R. ABLEMAN, *Marshal*.
By GEO. COGSWELL, *Deputy*.

And afterwards, to wit, on the twenty-first day of July, A. D. 1856, came the defendant, by his solicitor, Mr. Mariner, and entered his appearance, which said appearance is in the words and figures following, to wit:

Appearance.

U. S. District Court, district of Wisconsin.

GEORGE SMITH
vs.
JOHN J. ORTON. } In Equity.

Please enter my appearance for the defendant in the above entitled cause.

Yours, &c.,

E. MARINER, *Def't's Sol'r*.

B. K. MILLER, Esq., *Clerk*.

And afterwards, to wit, on the first day of September, A. D. 1856, came the defendant, by his solicitor, Mr. Mariner, and filed his demurrer, which said demurrer is in the words and figures following, to wit:

Dumurrer.

District Court of the United States for the district of Wisconsin.

The demurrer of John J. Orton to the bill of complaint of George Smith.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the said bill to be true in manner and form therein alleged, demurs thereunto, and for cause of demurrer showeth—

First. That it appears, from said bill, that the said defendant, before the filing of the bill of complaint in this cause, impleaded the said David Knab in a certain suit in equity in the circuit court of Milwaukee county, State of Wisconsin, praying a specific performance of the condition of said bond executed by said Knab to said Butler, and by him assigned to this defendant; in which suit a decree for a specific performance has been rendered against said Knab, and a deed of the premises described in said bond executed to this defendant; and that during the pendency of said suit, the said complainant purchased the interest of said Knab in said premises, and became a privy in estate in said premises, and is bound by such decree.

Second. That said bill sets out two cases for relief, which are inconsistent with each other, and is double.

Third. That the complainant has not made or stated such a case in his said bill as entitles him to relief in a court of equity against this defendant; wherefore this defendant demands judgment of this court, whether he shall be compelled to make further or other answer to said bill, or the matters therein stated, and prays to be hence dismissed with his costs in this behalf sustained.

E. MARINER, *Def't's Sol'r.*

I hereby certify that, in my opinion, the above demurrer is well founded in point of law.

WM. P. LYNDE, *of Counsel.*

DISTRICT OF WISCONSIN, *ss.*

John J. Orton, being duly sworn, says that the above demurrer is not interposed for purpose of delay.

J. J. ORTON.

Subscribed and sworn before me, this 30 day of August, 1856.

WINFIELD SMITH,
U. S. Commissioner.

And afterwards, to wit, on the sixth day of October, A. D. 1856, came the complainant, by his solicitors, Messrs. Brown & Ogden, and entered an order in the order and rule book, on the defendant to plead, which said order is in the words and figures following, to wit:

Rule to Plead.

Of the first Monday of October, A. D. 1856.

GEORGE SMITH
vs.
JOHN J. ORTON. } In Chancery.

On motion of Brown & Ogden, solicitors for the complainant, it is ordered that the defendant in the above entitled cause appear and plead, answer or demur to said complainant's bill of complaint by the first Monday of November next, or said bill will be taken as confessed against him.

BROWN & OGDEN,
Sol's for Compl't.

And afterwards, to wit, on the 13th day of October, A. D. 1856, came the complainant, by his solicitors, and filed his motion, as follows:

Time for Hearing Demurrer Extended.

District Court of the United States for the district of Wisconsin.

GEORGE SMITH
vs.
JOHN J. ORTON. } In Chancery.

Before the honorable Andrew G. Miller, judge, &c., at chambers.

On motion of Brown & Ogden, sol'rs for the complainant, it is ordered by the judge that the time to set the demurrer, filed in said cause, down for hearing be extended to the next rule day, (the same being inclusive.)

Demurrer set down for Argument.

And afterwards, to wit, on the 3d day of November, A. D. 1856, came the complainant, by his solicitors, and on his motion it is ordered that the demurrer filed by the defendant in this cause be and the same is set down for argument according to the rules and practice of this court.

And now, at this same term, to wit, on the seventh day thereof, to wit, on the 12th day of January, A. D. 1857, the following proceedings were had, to wit:

Amendment to Demurrer.

U. S. District Court.

GEORGE SMITH
vs.
JOHN J. ORTON. } In Equity.

And now comes the said defendant, by his solicitor, and leave thereto being first had and obtained, doth assign as an additional cause of demurrer in the above entitled cause, that it doth appear from the said

bill of complaint that the said complainant is not in actual possession of the premises in said bill described, and prays as in and by his demurrer aforesaid he has already prayed.

E. MARINER, *Def't's Sol'r.*

And afterwards, to wit, on the sixteenth day of said term, to wit, on the 3d day of February, A. D. 1857, the following other proceedings were had, to wit:

Decree.

GEORGE SMITH vs. JOHN J. ORTON. } In Equity.

This day this cause came on to be heard on the demurrer of the defendant to the complainant's bill of complaint, and was submitted by the counsel of the parties without argument.

In consideration whereof it is ordered by the court, that the said demurrer be, and hereby is, sustained. And it is further ordered, adjudged and decreed, that the said bill of complaint be, and hereby is, dismissed, but without prejudice, and that the said complainant pay the costs to be taxed, and in default thereof, that an execution be issued against him for the same.

A. G. MILLER.

Appeal.

From which said decree so as aforesaid rendered, the said complainant, by his solicitor aforesaid, has prayed an appeal to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next, and to him it is granted; and it is ordered that the said complainant file a bond, with one surety, in the sum of five hundred dollars.

And afterwards, to wit, on the sixth day of February, A. D. 1857, came the said complainant and filed an appeal bond, which said bond is in the words and figures following, to wit:

Appeal Bond.

District Court of the United States for the district of Wisconsin.

GEORGE SMITH vs. JOHN J. ORTON. }

Know all men by these presents, that we, Thomas L. Ogden and Hans Crocker, of the city of Milwaukee, are held and firmly bound unto John J. Orton, the above named defendant, in the sum of five hundred dollars, to be paid to the said John J. Orton; for the payment of which, well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fourth day of February, in the year of our Lord one thousand eight hundred and fifty-seven.

Whereas the above named George Smith has prosecuted his appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled suit by the judge of the district court of the United States for the district of Wisconsin:

Now, therefore, the condition of this obligation is such, that if the above named George Smith shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make his said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

H. CROCKER, [SEAL.]
THOMAS L. OGDEN. [SEAL.]

UNITED STATES OF AMERICA,
District of Wisconsin.

Hans Crocker and Thomas L. Ogden, being severally duly sworn, depose and say, and each for himself says, that he is worth the sum of five hundred dollars over and above his just debts and liabilities.

H. CROCKER,
THOMAS L. OGDEN.

Sealed and delivered, and taken and acknowledged this 6th day of February, A. D. 1857, before me.

J. L. HATHAWAY, *Clerk*.

Feb. 6, 1857. Approved.

A. G. MILLER, *Judge*.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Wisconsin, ss.

I, John L. Hathaway, clerk of the district court of the United States of America for the district of Wisconsin, do hereby certify the foregoing, contained on thirty-two pages as numbered, to be a true copy as of record of the bills, proofs, demurrer, and proceedings in the case of George Smith against John J. Orton.

In testimony whereof I have hereunto set my hand and duly affixed the seal of said court, at Milwaukee, this thirtieth day of [SEAL.] March, in the year of our Lord one thousand eight hundred and fifty-seven, and of our independence the eighty-first.

J. L. HATHAWAY, *Clerk*.

Citation.

The United States of America to John J. Orton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at the city of

Washington on the first Monday of December next, pursuant to an appeal from a decree of the district court of the United States of America for the district of Wisconsin, wherein George Smith is appellant and you are appellee, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this sixth day of February, in the year of our Lord one thousand eight hundred and fifty-seven, and of our independence the eighty-first.

A. G. MILLER,
Judge District Court of the U. S.
for the district of Wisconsin.

Return.

The above citation served on the above named John J. Orton, by showing him the original, and giving him a copy thereof, March 28th, 1857.

S. V. R. ABLEMAN, *Marshal.*
By GEO. COGSWELL, *Deputy.*

Service - - -	$2 00
Copy - - -	20
Travel - - -	06
	$2 26

George Cogswell, deputy United States marshal for the district of Wisconsin, being duly sworn, says that he served the above citation as above stated.

GEO. COGSWELL.

Subscribed and sworn to before me this 1st day of April, A. D. 1857.

J. L. HATHAWAY,
Clerk Dist. Court of the U. S.
for dist. of Wisconsin.

Filed 6th Aug., 1857.